In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1211

SAM L. MACCORKLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 2a–3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1969. (Pet. 1a–2a.) The petition for a writ of certiorari was filed on March 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a speedy trial.
2. Whether the trial court erred in charging the jury.

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3. Whether it was an abuse of discretion for the trial court to admit evidence that in the seven years prior to the years in question, petitioner filed returns for three of the years and failed to file returns for four years.

STATEMENT

After a jury trial, petitioner was convicted on all five counts of an indictment charging that he wilfully failed to file income tax returns for the years 1959, 1960, 1961, 1962 and 1963, in violation of Section 7203 of the Internal Revenue Code of 1954 (R. Vol. I, Item No. 2.).[1] It was stipulated that petitioner failed to file timely returns and that his gross income for these years was $21,520.37, $20,993.38, $22,579.76, $22,258.23, and $29,723.43, respectively (R. Vol. I, Item No. 20.). Petitioner was sentenced on Count One to serve four months in custody of the Attorney General, and was given probation on each of the other four counts (R. Vol. I, Item No. 29.). The court of appeals affirmed.

Petitioner testified that he was admitted to the bar in West Virginia in 1940, and that he was practicing law and acting as a County Commissioner of Accounts during the years 1952, 1953 and 1954. He admitted that he failed to file income tax returns for those years until the District Director of Internal Revenue inquired whether he had done so. At that time a Revenue Agent informed him that he could be prosecuted. He then filed delinquent returns and believed he would

[1] "R." references are to the eight volume record certified to this Court by the court of appeals.

thereafter "be checked pretty regularly." (Pet. 32a–36a, 42a–43a, 52a–54a.)

Petitioner also testified that in 1959 he was appointed as Assessor of Kanawha County. His duties included placing valuations on assessable property and he received a salary in the amount of $7,500 per year which was subject to withholding taxes. The balance of his official compensation was from collecting Capitation and Dog Taxes and was not subject to withholding. Petitioner testified that he failed to file income tax returns for the year 1958 because of his involvement in reassessment problems and in primary elections held in April and May of 1959 (Pet. 20a, 23a–25a). He said that he was involved in elections in May of 1960, in 1962 and in April of 1963, and that there was never any time after 1959 when he was not a busy person (Pet. 27a–31a). He testified that he knew he was required to file timely returns during the years 1959 through 1963 but did not do so until a Revenue Agent called on him to inquire about the 1963 return (Pet. 19a, 40a).

Petitioner stated that the problem of filing returns "got bigger and bigger" as it accumulated (Pet. 40a), that he knew he could file returns without paying the tax (Pet. 55a), and that his problem had been to choose between filing his tax returns and doing something else and that he "did something else." (Pet. 24a–25a, 28a, 38a, 58a).

ARGUMENT

1. Petitioner was not denied a speedy trial. In *Ewell* v. *United States,* 383 U.S. 116, 120, 122, this Court stated that the "right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." Although noting that the "delay must not be purposeful or oppressive", the Court in *Ewell* held that a nineteen months delay did not necessarily violate the Sixth Amendment, particularly in view of the defendant's inability to demonstrate any possible prejudice, such as by a loss of evidence or the disappearance of witnesses.

The delay in this case has not been purposeful, oppressive or prejudicial. The first indictment was returned on March 25, 1966, in the Northern District of West Virginia. (R. Vol. I, Item No. 33.) [2]

Petitioner promptly filed a motion to transfer the case to the Southern District of West Virginia, and the district court ordered all further proceedings continued pending consideration of the motion to transfer. (R. Vol. I, Item No. 42.)

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[2] Unlike the case of *Hanrahan* v. *United States*, 348 F. 2d. 363 (C.A.D.C.), cited by petitioner (Pet. 13), the Government here had no choice of venue, as venue for failure to file tax returns is in the district where they should have been filed. *United States* v. *Lombardo*, 241 U.S. 73; *DeCesare* v. *United States*, 356 F. 2d 107, 108 (C.A. 5); *United States* v. *Foster*, 197 F. Supp. 387 (Md.). On November 2, 1966, Congress enacted P.L. 89–713, Sec. 2, 80 Stat. 1108, which amended 18 U.S.C., Section 3237(b) by adding Section 7203 of the Internal Revenue Code of 1954 to the list of offenses wherein a defendant has an unqualified right to remove a prosecution to the district of his residence.

After the case was transferred to the Southern District of West Virginia by order of a visiting judge (R. Vol. I, Item No. 43),[3] petitioner filed, inter alia, a motion to dismiss the indictment on various grounds, including improper constitution of the grand jury and unreasonable delay both before and after return of the indictment. (R. Vol. I, Item No. 37.) The indictment was dismissed on the ground that the grand jury had not been properly impaneled. (R. Vol. I, Item No. 38.)

The second indictment was returned in the Northern District of West Virginia on January 18, 1968, and, on motion of petitioner, transferred to the Southern District. On February 19, 1968, petitioner filed a new motion to dismiss on the ground of unreasonable delay both before and after return of the first indictment. The motion was denied, and the case was tried in July of 1968. (Pet. 5.)

It is apparent that the pace of proceedings after transfer of the first indictment to the Southern District cannot reasonably be questioned. The lapse of time prior to the first indictment was substantial but is nowhere shown to have been oppressive. The methodical investigation and evaluation of criminal tax violations is well publicized and is of substantial value

[3] While the record does not show why the original trial judge disqualified himself, it should be noted that the Chief Judge of the Southern District, who presided over pre-trial motions by consent of the parties (R. Vol. I, Item No. 14), stated that he also would prefer to disqualify himself because of former acquaintance with the petitioner (R. Vol. I, Item No. 46) and it is evident from petitioner's testimony that his active political life would have inevitably created the likelihood of acquaintance with many public officials.

to an individual taxpayer, who has many opportunities to be heard and to show reasons why a criminal charge should not be filed. See *Schlinsky* v. *United States,* 379 F. 2d 735, 737 (C.A. 1), certiorari denied, 389 U.S. 920 (no unreasonable delay where investigation started in 1961 and indictment returned in 1965); *Foley* v. *United States,* 290 F. 2d 562, 565-566 (C.A. 8) (delay not unreasonable where investigation started in 1954 and indictment returned in 1959).

Petitioner's sole defense was that he was faced with conflicting responsibilities and, instead of working on income tax returns, chose to do something else. (Pet. 38a.) The lapse of time has not hindered him in any way in asserting this defense.

2. Petitioner's contention that the trial court erred in refusing to grant certain instructions is without merit.

a. Petitioner's Instructions Nos. 10, 11, 12 and 13 (Pet. 62a–65a) relate to the elements of the offense charged and, with respect to the element of wilfulness, they state that it is essential for the jury to "determine that his motive was evil, and that he failed to file them for some bad purpose."

The trial court's charge did not use the term "evil motive" but informed the jury that the failure to file returns must be "wilfully and knowingly done" (Pet. 74a). The trial court explained thoroughly to the jury (Pet. 75a) that the element of wilfulness involved a "bad purpose."[4] Petitioner's claim (Pet. 22–23) that

[4] The jury were charged as follows on wilfulness:

"Now, the third element is where the controversy is in this Case—the third essential element which the Government is re-

the last sentence of the court's charge on "bad purpose" is contrary to *United States* v. *Murdock,* 290 U.S. 389, is unfounded. In *Murdock* the defendant had been denied any defense based on a good faith mistake as to his duty to answer, whereas here the very sentence which petitioner criticizes states that "bad purpose" requires *knowledge* by the defendant that the law requires him to file the tax returns.

b. Petitioner's Instructions Nos. 3, 5, 6 and 9 (Pet. 60a–62a) relate to reasonable doubt and No. 5 would inform the jury that the evidence must "exclude every reasonable hypothesis of innocence." The trial court carefully explained the concept of reasonable doubt to the jury and advised them that before convicting they

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quired to prove beyond a reasonable doubt, in order to establish the offense charged in the indictment is that the Defendant failed to file the income tax returns within the time required by law; that that failure was wilfully and knowingly—now, the word, "wilful" has a number of different meanings, depending on the context in which it is used. As it is used in the Statute which I have read to you and the one that is involved in this Case, "wilful" means voluntary, purposeful deliberate, and intentional as distinguished from accidental, inadvertent or negligent. Mere negligence, even gross negligence, for that matter, is not sufficient to constitute wilfulness. It means an act done with bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately or perversely, with bad motive and with a specific and wrongful intent. In other words, a failure to act is wilfully done if done voluntarily, purposefully, and with a specific intent to fail to do what the law requires to be done; that is to say, with bad purpose, either to disobey or bad motive to disregard the law. I charge you that the only bad purpose necessary for the Government to prove in this Case, is the deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them."

should be morally certain of petitioner's guilt and certain that they "cannot reconcile the evidence with any reasonable hypothesis of innocence." (Pet. 79a.) Petitioner fails to show any essential difference between his requested instruction and the charge as given. In fact, the trial court's charge that every reasonable hypothesis of innocence should be excluded was more favorable to petitioner than is required. *Holland* v. *United States,* 348 U.S. 121, 139–140; *Samuels* v. *United States,* 398 F. 964, 970 (C.A. 5), certiorari denied, 393 U.S. 1021.

3. There is no merit to petitioner's contention (Pet. 27–28) that his tax returns for 1952–1958 had no probative value and were erroneously admitted as exhibits. The trial court carefully instructed the jury that these returns (showing a failure to file timely returns for 1952, 1953, 1954 and 1958, and the filing of timely returns for 1955, 1956 and 1957) should be considered solely for their bearing on petitioner's "state of mind" and intent.[5]

Petitioner's plea of not guilty put in issue the element of wilfulness. *Hamman* v. *United States,* 340 F. 2d 145, 149 (C.A. 9), certiorari denied, 380 U.S. 977. The timely returns tended to prove knowledge of a duty to file returns. *United States* v. *Ostendorff,* 371 F. 2d 729, 731 (C.A. 4), certiorari denied, 386 U.S. 982. The delinquent returns tended to show petitioner's casual attitude toward discharging that duty. *Gannon* v. *United States,* 244 F. 2d 541 (C.A. 2).

[5] The term "pattern" was used in the trial court's charge solely in summarizing the Government's contention as to the years named in the indictment and the jury was told that this was for them to decide. (Pet. 76a–77a.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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